U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: January 19, 2000
CASE NO.: 2000 - INA - 5

In the Matter of:

PRINCE YEBOAH,
Employer

on behalf of

DANIEL DWUMFOUR,
Alien

Appearance: Randall L. Johnson, Esq.
Arlington, VA

Certifying Officer: Richard Panati
Philadelphia, PA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Daniel Dwumfour ("Alien") filed by Employer Prince Yeboah ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the

employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on October 22, 1999; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a grounds of appeal was not stated in the request for review by the Board of Alien labor Certification Appeals (the "Board"). Employer has submitted a Statement of Position.

Statement of the Case

On January 13, 1998, Employer filed an application for labor certification to enable him to fill the position of Customer Service Manager in his retail store, African House. The store is located in Richmond, Virginia. The position is described as follows:

> "Supervises and coordinates activities of workers of retail store. Listens to customer complaints, examines return merchandise, and resolves problems to restore and promote good public relations. May assist sales workers in completing difficult sales. May sell merchandise. May approve checks written for payment of merchandise. May install and remove cash register tape and audit cash receipts. Usually performs customer service activities."

A college education was required, with a Bachelor's degree. No experience was necessary or special skills noted. The base salary was $25,000.00 per year, based upon a 40 hour week. Overtime would be worked as needed, and paid at time and a half. (AF-46).

Employer placed an advertisement for the position in The Richmond Times from August 8 until August 10, 1998. Twenty-four persons applied, and were referred to Employer on August 18, or September 2, 1998 by the Virginia Employment Commission. ("VEC"). (AF-28, AF-12). Each of these people was sent, by certified mail, a letter asking them to contact Employer by telephone for "a telephone appointment," and set a 2 hour window on a specific day when Employer could be reached. (AF-15, AF-21). Only five of the referrals called for appointments. (AF-51). Mr. Yeboah also posted a job notice in his place of business from September 4 through the 25, 1998, but no applications were forthcoming. (AF-54).

Of the five individuals who contacted Mr. Yeboah, four were interviewed. One declined the position because of a lack of health benefits, one because he felt he was not qualified to work in an African retail store, and one because he was looking for only part-time work. This last applicant, Mr. John Farrar, apparently was contacted by Mr. Yeboah in early October of 1998. It is unclear if he had previously contacted Employer, or if Mr. Yeboah was prompted by some other motivation to initiate another contact. The remaining interviewee, Mr. Alphonso Watson, contacted Employer on August 31, 1998, and was told that Employer would contact him again to set up an interview. An attempt was made to set up that interview on September 22, 1998, but Mr. Watson had by that time obtained other employment, and was no longer interested in the position. The final referral, Mr. Peter Stephens, contacted Employer on September 9, 1999. Employer informed him that he would call him back and set up an interview. On September 22, 1998, Employer attempted to contact Mr. Stephens, but could not reach him by telephone. Mr. Stephens did not respond to the messages left on his answering machine, and Employer has assumed that he no longer has an interest in the position. (AF-51).

On February 23, 1999, the CO issued his Notice of Findings ("NOF"), which proposed to deny certification based upon a violation of § 656.21(b)(6), which states that Employer is required to document that U.S. workers were rejected solely for job-related reasons. This failure to document led the CO to conclude that the position was not truly open to U.S. workers in violation of § 656.20(c)(8). Specifically, the CO found that Employer unjustifiably delayed in contacting Peter Stephens and Alphonso Watson to schedule interviews and that such delay contributed to the unavailability of the workers. Both men were willing, able, qualified, and available on the date of the initial contacts, and only the delay of Employer led to their rejection of the position. Employer was found to have not conducted a good faith recruitment effort. (AF-9).

Employer filed a Rebuttal on March 24, 1999. This consisted of a sworn statement to the effect that the delay in scheduling an interview was caused by a necessary purchasing trip, which required Employer "to be out of the office for almost two weeks." Mr. Yeboah stated that he intended to show the newly acquired inventory to the interviewees upon his return. (AF-7).

A Final Determination ("FD") was issued by the CO on July 19, 1999, denying labor certification. The CO found, regarding Mr. Watson, that if an interview had taken place during the delay, a willing, able, qualified, and available U.S. worker would have filled the position instead of taking another job. The fact that another job was offered and accepted demonstrates his availability and capability. The same was presumed regarding Mr. Stephens, who never returned Employer's messages. The CO additionally stated that the scheduling of a purchasing trip in the midst of a recruiting effort was evidence of a lack of good faith. An employer who advertises a job and contacts prospective employees is put on notice that applicants will be contacting him, and that he will be required to be prepared for such. Employer's failure to be available when he knew applicants would be contacting him gave rise to a violation of § 656.20(c)(8), which requires that a position actually be open to U.S. workers.

On August 20, 1999, Employer requested reconsideration by the CO. The CO, on

September 27, 1999, denied to reconsider the FD, stating that such a procedure applies only to issues which could not have been addressed in the Rebuttal. He cited Harry Tancredi, 1988-INA-441 (Dec. 1, 1988). The CO forwarded the application to the Board for review. Pursuant to the Board's Notice, Employer submitted a Statement of Position on November 12, 1999, in a timely fashion.

Discussion

The good faith requirement in recruiting efforts is not set forth in the regulations, but is implicit. H.C. LaMarche Enterprises, Inc., 1987-INA-607 (Oct. 27, 1988). There is little question that the method of contact employed by Mr. Yeboah was adequate. He sent a certified letter requesting that the applicants contact him, and this is acceptable. Simon's Precision Machine, 1988-INA-105 (July 31, 1989). The denial focuses on the delay in following up with Mr. Stephens and Mr. Watson. An employer must contact applicants in a timely fashion after receiving the referrals. Loma Linda Foods, Inc., 1989-INA-289 (Nov. 26, 1991) (*en banc*). Employer maintains he did so because he contacted the applicants within the 14 day period the VEC required, and that the VEC did not actually require an interview in that period. (Employer's Statement, p. 4). However, a fairer reading of that requirement is that the contact must not only be within 14 days, it must be "for further interview, or [to] provide the applicant with reasons for rejection." Contact for purposes of informing an applicant an employer will call later to schedule a yet later interview does not fulfill the VEC requirement. Under this reading, Employer did not comply with the VEC requirements.

In this case, letters were sent to the applicants within a relatively short time after the résumés were received, and both gentlemen responded promptly, expressing interest in the position. At that point, however, Employer began to delay. Although Mr. Stephens called on September 9, 1999, and Mr. Watson on August 31, 1999, Employer did not attempt to schedule an interview with either of them until September 22, 1999, a period of 13 and 23 days, respectively. An unjustified delay in contacting the U.S. applicants, when it was feasible to contact the applicants earlier, is presumed to contribute to an applicant's unavailability. Creative Cabinet and Store Fixture, 1989-INA-181 (Jan. 24, 1990) (*en banc*).

An employer may avoid the implications of an untimely contact where it provides a reasonable justification for the delay. A justification is a factor outside the normal recruitment process, but within the employer's responsibility or control, which reasonably prevented the employer from contacting applicants as soon as possible. The interference may arise from either personal or professional matters; however, to justify a delay, the employer must show that it handled the outside interference reasonably. Loma Linda Foods, Inc., 1989-INA-289 (Nov. 26, 1991) (*en banc*). The justification offered by Employer here is the two week purchasing trip he had scheduled to replenish his inventory. In evaluating that justification, we consider several factors. Among these are Employer's ability to anticipate interference with the recruitment process, avoidability of that interference, and any attempts of Employer to mitigate the interference. This is not an exhaustive list.

The CO considered these factors, and concluded that Employer, in scheduling a purchasing trip during a period when he knew recruitment was going to be taking place, was not justified in the delay. We agree. There is no explanation given for why each applicant could not be interviewed at the time they called; one applicant was, but the others were put off and contacted later for interviews. Mr. Yeboah may have been busy "investigating places to visit" for his trip, but we find this fails to adequately explain the delay. In fact, if anything, it refutes the offered justification; if Mr. Yeboah was still in the planning stages of his trip, why could he not delay it a week or so and complete his recruitment?

Moreover, Mr. Yeboah's justification is inconsistent with the rest of the application. Employer states that his purchasing trip would require him "to be out of the office for almost two weeks." Presumably this covered the period between the first phone contact and the attempt to actually schedule an interview. He was still returning calls to applicants on September 9, 1999, and started calling to schedule interviews on September 20, 1998. (AF-51). This is not a two week period. Further, it does not explain why an interview could not have been scheduled with Mr. Watson between August 31, when he called Employer, and the date of the trip's start, sometime after September 9, 1998.

Most damaging to the credibility of the justification, however, is the statement that "it was my intention to show both applicants the material which I had expected them to sell when I interviewed them." (AF-51). We do not understand how the applicants were to be shown anything in the course of a telephone interview. The letters sent to the applicants clearly state that they were to call and set up "a telephone appointment." (AF-15, AF-21). Mr. Daniel Sutherland, the only person to be interviewed when he initially called, had a phone interview. Mr. Yeboah also states in an October 5, 1998 letter that he included as attachments his notes on the "five applicants with whom I communicated by telephone." This indicates that he never met with any of the applicants face to face. There is no reference to interview notes for Ms. Maxine Blue, the only applicant interviewed after the long delay. We find that the justification for the delay offered by Employer is insufficient, and that he has not rebutted the finding of a lack of good faith.

Therefore, we find that Mr. Watson was available, willing, able, and qualified at the time of the initial contact, and that his subsequent unavailability was caused by the unjustified delay by Employer. He was, therefore, rejected for reasons unrelated to the job in violation of § 656.21(b)(6). Mr. Stephens was also presumed to be unavailable due to the unjustified delay. Creative Cabinet and Store Fixture, 1989-INA-181 (Jan. 24, 1990) (*en banc*). Additionally, because Employer did not conduct a good faith recruiting effort, he has not demonstrated that the position is truly open to U.S. workers in violation of § 656.20(c)(8).

Order

Therefore, the Final Determination of the Certifying Officer is affirmed, and labor

certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.